

William R. Slomanson\* :

### Nagorno Karabakh: An Alternative Legal Approach to its Quest for Legitimacy

#### *Introduction*

As the Soviet Union was crumbling, some simmering ethnic and religious geopolitical hotspots began to boil. For some, de facto statehood—but not necessarily international recognition—was the forced endgame for these oblasts. Georgia's former provinces of South Ossetia and Abkhazia, and Serbia's Kosovo, are familiar examples of post-Soviet unilateral declarations of independence.<sup>1</sup> Nagorno Karabakh [NK] unilaterally declared its independence in 1991. NK was historically one of Armenia's fifteen provinces.<sup>2</sup> It is now situated wholly within Azerbaijan.<sup>3</sup>



As explained in a comprehensive overview by two independent U.S. think tanks: “In 1918, 330,000 Armenian people lived within the then-existing borders of Nagorno Karabagh. They made up 95 percent of its population, with 3 percent Azerbaijanis and 2 percent others. As a result of the Turkish-Azerbaijani aggression in 1918-1920 aimed at total cleansing of the

---

\* William R. Slomanson is Professor of Law, Thomas Jefferson School of Law (San Diego), and Visiting Professor, Pristina University School of Law (Kosovo).

<sup>1</sup> South Ossetia and Abkhazia recognize each other, and are recognized by Russia, Belarus, and Nicaragua. The vast majority of other countries do not recognize their 1991 unilateral declarations of independence from Georgia. Kosovo (2008) is recognized by 91 countries. Nagorno Karabakh has no recognitions.

<sup>2</sup> Id., Appendix A Maps, at 159–172 (perhaps the best readily available collection of historical Armenian area maps). Further reading is available in the two articles focusing exclusively on NK: (1) Comment, *Territorial Stalemate: Independence of Nagorno-Karabakh Following the Dissolution of the Soviet Union, and its Lingering Effects Decades Later*, 34 Suffolk Transnat'l L. Rev. 375 (2011); and (2) Comment, *Nagorno-Karabagh's Right to Political Independence Under International Law: An Application of the Principle of Self-Determination*, 24 Sw. U. L. Rev. 183 (1994).

<sup>3</sup> Map available in Wikipedia, at: <<http://en.wikipedia.org/wiki/Nagorno-Karabakh>>.

Armenians of Nagorno Karabagh, an estimated 20 percent of all Armenians were killed.”<sup>4</sup> Most of NK’s Armenian population fled during the repressive Turkish massacres of Armenians starting in 1915—a number of whom settled in the Los Angeles area.<sup>5</sup>

In 1919, the UK assigned NK to Azerbaijan. The Armenian government unsuccessfully protested, requesting that the British administer this region until the conclusion of the post-WWI peace conference.<sup>6</sup> Moscow officially annexed NK to the Azerbaijan Soviet Socialist Republic (SSR) in 1921. Given the events spanning the 1915 Armenian Genocide, and NK’s 1988–1994 war with Azerbaijan, there are now only a total of 153,000 NK residents. They are 75% Armenian and virtually 100% Christian. There is a small Azeri Muslim community of several hundred residents.<sup>7</sup>

### *Region’s Significance*

NK is not just a blip on the international community’s radar. Richard Giragosian is a Yerevan-based US analyst, and previous advisor to the Pentagon and CIA. He believes that Azerbaijan sees 2014 as a deadline for the peace process. His assessment is that “Azerbaijan is following a new military strategy based on a build-up of [arms] procurement and preparations for ‘attaining operational readiness’ by 2014—i.e. threatening war by the 20th anniversary of the [1994] ceasefire if there is no progress in the peace process.”<sup>8</sup>

The NK-Azeri conflict has the potential to destabilize the Southern Caucasus, Iran, and beyond. This conflict resulted in trebling NK’s size, well beyond its internal administrative borders within the former Azerbaijan SSR. Augmentation by conquest—no longer recognized in International Law—routinely foments lingering territorial disputes. Everyone whines, but no one wins.<sup>9</sup> For example, NK has now experienced a state of war and low-intensity conflict with Azerbaijan for

<sup>4</sup> Public International Law & Policy Group and the New England Center for International Law & Policy, *The Nagorno-Karabakh Crisis: A Blueprint for Resolution* (2002), at: <<http://www.nesl.edu/userfiles/file/center%20for%20international%20law%20and%20policy/nagorno.pdf>>.

[hereinafter *Blueprint*]. “Karabagh” is the alternative Armenian spelling of “Karabakh.”

<sup>5</sup> Global affirmations of this event as “genocide” are provided by the Armenian National Institute, at: <<http://www.armenian-genocide.org/affirmation.html>>. While not necessarily the official US position, these affirmations do include US presidential and legislative proclamations, and resolutions in 43 US states.

<sup>6</sup> Summary of Armenian History §2.10.2, in Haig E. Asenbauer, *On the Right of Self-Determination of the Armenian People of Nagorno-Karabakh* 46 (Armenian Prelacy: New York, NY, 1996) (Papazin German to English translation) [hereinafter *Asenbauer*].

<sup>7</sup> Meeting with Arai Harutyunyan, NK Prime Minister (Aug. 9, 2012) in Stepanakert, NK’s capital city. On the next day, Yuri Hayrapetyan, Human Rights Defender of the Republic of Nagorno Karabakh, told me: (1) NK’s Azeri’s suffer no repression; and (2) his Azeri counterpart’s office in Baku refuses to cooperate with Hayrapetyan’s office. In January, 2012, the European Court of Human Rights affirmed the admissibility of the case alleging that in 1992, internally displaced Azerbaijani refugees were forced to flee from their homes in NK, but have not been able to return. *Chiragov and Others v. Armenia*, Application no. 13216/05 (Grand Chamber—majority decision: Jan., 2012), at: <

<sup>8</sup> Andrew Rettman, *‘Normal’ shooting resumes in Armenia-Azerbaijan conflict*, euobserver.com (June 11, 2012), at: <<http://euobserver.com/foreign/116579>>.

<sup>9</sup> Israel’s wartime conquests of its neighboring Arab lands, and NK’s takeover of Azeri districts beyond NK, are the subject of numerous UN Security Council resolutions (addressed below).

over two decades.<sup>10</sup> Today, there are periodic skirmishes on the front line at NK's eastern border with Azerbaijan. Israeli drones provide sniping reconnaissance.<sup>11</sup> Azeri snipers kill at least one NK soldier per month.<sup>12</sup>

Other potential stability concerns in this region include: (1) Azeri oil—one-third of Israel's oil is provided by Azerbaijan; and the Azerbaijan-Georgia-Turkey pipeline (2005) passing within twelve kilometers of NK. (2) Foreign military presence—Azerbaijan is a key staging ground for US forces en route to Afghanistan; and Russian troops could readily enter either Azerbaijan or Armenia, for the stated purpose of regional peacekeeping—as done in Georgia during the Russian-Georgian conflict.<sup>13</sup> (3) Neighboring Azeri-Iranian province—Azeri-Iranians have been demanding greater cultural and language rights. Some 30 million of them live in or near the East Azerbaijan province of northwest Iran, located some 40 kilometers from NK. Were current US-Israeli-Iranian tensions to erupt into more pronounced hostilities, Azeri secessionism could surface in northwestern Iran.

The above destabilization concerns are not limited to the South Caucasus region. The ripple effect has impacted various European nations as well—most recently Hungary. Hungary is a NATO member. Armenia and Azerbaijan are in NATO's Partnership for Peace program.<sup>14</sup> Hungary presumably has no position at present on NK's status, and will not likely take one as a result of the incident which follows.

Armenia broke off diplomatic ties with Hungary in late August, 2012. Armenia did so, because Hungary transferred an Azeri army officer to Azerbaijan. He had been convicted (four years earlier) of murdering an Armenian soldier during a NATO training exercise in Hungary. This prisoner transfer was undertaken pursuant to the 1983 Convention on the Transfer of Sentenced Persons.<sup>15</sup> Hungary expected that the Azeri soldier would continue to serve his life sentence in Azerbaijan.

Azerbaijan, however, subsequently pardoned that Azeri military officer, rather than requiring him to complete his prison sentence under the terms of the Transfer of Sentenced Persons treaty. Azerbaijan defended its decision, on the shaky foundation that his pardon was a consequence of Armenia's occupation of the Azeri province of NK. OSCE negotiators responded to Armenia's

---

<sup>10</sup> The popular uprisings began in 1988, but an official state of war lasted from 1991–1994. The conflict has never ceased. See generally Michael Croissant, *The Armenia-Azerbaijan Conflict: Causes and Implications* (Westport, CT: Greenwood Press, 1998).

<sup>11</sup> Tim Judah, *Israel's front-line in the South Caucasus*, Jewish Chronicle Online (Feb. 6, 2012), at: <<http://www.thejc.com/comment-and-debate/comment/63154/israels-front-line-south-caucasus>>.

<sup>12</sup> Interview with Deputy Commander at an NK military base (Aug. 11, 2012). An account of military activity near the Martakert front line, with pictures, is available in Sara Anjargolian, *The thousand-yard stare: On the Nagorno-Karabakh frontline*, at: <<http://hetq.am/eng/multimedia/slideshows/59>>.

<sup>13</sup> Russia occupied a sizable buffer zone, well beyond the 2008 geographical conflict. It once extended to within 20 kilometers of the Tbilisi capital. Meeting with Georgia's conflict diplomat, and leading law professor, Levan Alexidze (Aug. 3, 2012) at Tbilisi State University.

<sup>14</sup> For Partners (potential State members), see: <[http://www.nato.int/cps/en/natolive/topics\\_82584.htm](http://www.nato.int/cps/en/natolive/topics_82584.htm)>.

<sup>15</sup> *Armenia cuts diplomatic ties with Hungary over freed prisoner*, euronews (Sept. 1, 2012), at: <<http://www.euronews.com/2012/09/01/armenia-cuts-diplomatic-ties-with-hungary-over-freed-prisoner>>. Hungary rendered this convicted murderer pursuant to the 1983 Convention on the Transfer of Sentenced Persons, at: <<http://conventions.coe.int/Treaty/en/Treaties/Html/112.htm>>.

recognition withdrawal as being harmful to the OSCE peace negotiations between Armenia and Azerbaijan.<sup>16</sup>

### *US-UN-OSCE Agenda for NK*

Per US Senate-House Joint Resolution 178 (1989): “[I]t is the sense of the Congress that the United States should—

- (2) urge Soviet[s] ... to restore order, immediately reestablish unrestricted economic and supply routes to the people of Armenia and Nagorno-Karabagh, secure the physical safety of the people of Nagorno-Karabagh from attacks and continue a dialog with representatives of Nagorno-Karabagh regarding a peaceful settlement;
- (3) promote ... with the Soviet Union an equitable settlement to the dispute over Nagorno-Karabagh ...;
- (4) urge ... the Soviet Union that an investigation of the violence against the people of Nagorno-Karabagh be conducted, and that those responsible for the killing and bloodshed be identified and prosecuted; and
- (5) express the serious concern of the American people about the ongoing violence and unrest which interferes with international relief efforts.<sup>17</sup>

A dozen years later, the US opted, instead, for diplomatic mediation. As stated by Presidents Obama (US), Putin (Russia), and Hollande (France) in June 2012—a month prior to NK’s 2012 national elections:

We ... are united in our resolute commitment to a peaceful settlement of the Nagorno-Karabakh conflict. ... [We call upon the leaders of Armenia and Azerbaijan to ... “accelerate” reaching agreement on ... the Nagorno-Karabakh [c]onflict. ...] Military force will not resolve the conflict and would only prolong the suffering and hardships endured by the peoples of the region for too long. Only a peaceful, negotiated settlement can allow the entire region to *move beyond the status quo* toward a secure and prosperous future.<sup>18</sup>

The Western position is that NK is still an Azeri province.<sup>19</sup> In the aftermath of NK’s secession, the US has tilted toward supporting Azerbaijan in this conflict. As stated by Vice President Chaney, on behalf of President Bush, just four years ago:

The U.S. and Azerbaijan ... both seek greater stability, security and cooperation in ... [this] vital region of the world. We share the goal of energy security [i.e., exportation of Azeri oil] for ourselves and for the international community. ... One of the basic

<sup>16</sup> Jim Heintz, *OSCE decries Azerbaijan-Armenia tensions* (Sept. 3, 2012), at:

<<http://www.statesman.com/news/nation/osce-decries-azerbaijan-armenia-tensions-2449601.html>>.

<sup>17</sup> Library of Congress website, at: <<http://thomas.loc.gov/cgi-bin/query/C?c101:/temp/~c101WKYDjO>> (italics removed).

<sup>18</sup> White House, U.S.-Russia-France Statement on Nagorno-Karabakh (June 18, 2012), at: <<http://translations.state.gov/st/english/texttrans/2012/06/201206187658.html#axzz25LgWmULW>> (italics added). NK’s position is currently committed to *maintaining* the status quo. See text accompanying note 34 below.

<sup>19</sup> Alexander Manasyan, *Nagorno Karabakh Conflict: Thirty-Three Political and Legal Facts and Arguments* 23 (Yerevan: Republic of Armenia Ministry of Diaspora, 2012) [hereinafter Manasyan].

foundations of security and peace is respect for national borders—a principle that is endangered today. ... America strongly supports the sovereignty and territorial integrity of Azerbaijan. We are committed to achieving a negotiated solution to the Nagorno–Karabakh conflict—a solution that starts with the principle of territorial integrity.... Achieving a solution is more important now than ever before; that outcome will enhance peace and stability in the region, and Azerbaijan’s security, as well.<sup>20</sup>

Four UN resolutions in 1993—in the midst of the NK-Azeri war—attempted to keep this long-simmering conflict in check. The first one called for NK to withdraw from the Kelbejar district of Azerbaijan (see above map, between Armenia and NK). Absent any rock-solid Azeri concessions, NK has understandably refused to do so. As explained by NK’s Chief Information Officer, the occupied Kelbejar district is far too strategic to return it to Azerbaijan. The latter could amass military forces in this thin zone which barely separates NK from Armenia. Further, the Azeri’s could poison or pollute the two rivers flowing east from Armenia—through the Kelbejar district—into NK.<sup>21</sup> The other three UN resolutions likewise call upon NK (and for Armenia to use its influence) to return several more Azeri districts taken by NK during the War.<sup>22</sup> Given the existential threat to NK, it has ignored these Security Council resolutions as well.

European parliamentary organs have pressed the Organization for Security and Cooperation in Europe (OSCE) to rekindle status negotiations between Baku (Azeri capital) and NK.<sup>23</sup> The OSCE’s Minsk Group on Nagorno Karabakh (Minsk Group) is co-chaired by France, the Russian Federation, and the US. The May 2012 Minsk Group meeting sought to implement a framework for a comprehensive peace settlement, to work on a mechanism to investigate ceasefire violations, and to develop humanitarian contacts. The Co-Chairs expressed their concern over recurring incidents along the NK-Azeri frontlines, and urged both sides to exercise restraint and refrain from retaliation. The Minsk Group’s essential position is that “[t]he harsh reality of the situation ... has reinforced the view of the Co-Chairs that the *status quo* is *unacceptable*, and that only a peaceful, negotiated settlement can bring the prospect of a better, more certain future to the people ... who live there now.”<sup>24</sup>

### *National Status Instruments*

NK’s political landscape has been rather turbulent for centuries. Fast-forwarding to 1988, perestroika and glasnost encouraged NK’s Armenians to take steps to break free of Azerbaijani control. They announced their intent to achieve at least autonomy. But the Supreme Soviet of the Azerbaijan SSR denied this request. The Azeri rejection was countered by Armenia’s Supreme

<sup>20</sup> America.gov Archive, Cheney, Azerbaijani President Aliyev Remarks After Meeting in Baku: Leaders discuss U.S.-Azerbaijan bilateral relations, Georgia, energy security (2008)), at: <<http://www.america.gov/st/texttrans-english/2008/September/20080903153054eafas0.2325403.html#ixzz1ETOA5Abi>>.

<sup>21</sup> Meeting with David Babayan (Aug. 10, 2012) in Stepanakert, NK.

<sup>22</sup> All four resolutions are conveniently posted at:

<[http://en.m.wikipedia.org/wiki/List\\_of\\_United\\_Nations\\_Security\\_Council\\_resolutions\\_on\\_the\\_Nagorno-Karabakh\\_conflict](http://en.m.wikipedia.org/wiki/List_of_United_Nations_Security_Council_resolutions_on_the_Nagorno-Karabakh_conflict)>.

<sup>23</sup> Manasyan, *supra* note 19, at 18. The OECD Minsk Group’s 2007 Madrid Principles of Karabakh Conflict Settlement thus call for withdrawal from the various districts occupied by NK military forces. The Madrid Principles and related blog comments are available at:

<<http://unzipped.blogspot.com/2008/10/disclosed-madrid-principles-of-karabakh.html>>.

<sup>24</sup> Executive Summary, *Report of the OSCE Minsk Group Co-Chairs’ Field Assessment Mission to the Occupied Territories of Azerbaijan Surrounding Nagorno-Karabakh* (2006), at: <<http://www.osce.org/mg/76209>> (italics added). NK’s opposing policy, on the other hand, is to maintain the status quo. See text accompanying notes below.

Soviet. It approved NK's proposed autonomy, and appealed to Moscow to resolve this inter-SSR conflict.<sup>25</sup>

In December 1989, the Armenian SSR boldly announced the reunification of NK with the Armenian SSR.<sup>26</sup> Unlike the unrest in Budapest in 1956, the USSR was no longer in a position to react militarily to this announcement. Instead, its April 1990 response was to promulgate a statute entitled Procedure of Solving Issues Related to the Withdrawal of Union Republics from the USSR.<sup>27</sup> NK's autonomy supporters have since characterized that statute as effectively overruling the Soviet Constitution. Years earlier, the Constitution gave the SSRs—but *not* their oblasts—at least the theoretical right to secede from the Soviet Union.<sup>28</sup>

According to the Ministry of Diaspora of the Republic of Armenia, this 1990 statute authorized autonomous entities to independently decide their national status (should the Soviet Union disintegrate), including the right to statehood.<sup>29</sup> Azerbaijan has consistently rejected this interpretation. An OSCE Minsk Group study supports the Azeri position: "[T]his law provided autonomous regions within the Soviet republics with the right to determine independently, by referendum, whether they wished to remain within the USSR or join the republic seceding from the USSR. It would however seem that according to this law N-K would have the choice of [only] two options—to remain within the USSR or to join [an] independent Azerbaijan; N-K independence does not seem possible."<sup>30</sup>

Perhaps the most persuasive document of all is the (non-governmental) 2006 Russian-American Dartmouth Conference report. The participants were public figures from all concerned countries. They presented their findings to the respective governments, deducing that *no single document* will acquire legal power without the conciliation of all constituencies involved in the NK conflict.<sup>31</sup>

### *Armenia's Non-recognition Posture*

NK's unilateral declaration of independence occurred without the express support of—or eventual recognition by—Armenia. Armenia's presumptive rationale is that it is a charter member of the post-Soviet Union Commonwealth of Independent States. As Article 13 of that alliance

<sup>25</sup> Blueprint, note 4 *supra*, at 4.

<sup>26</sup> Asenbauer, §3.7 *Failure of the Political Solution*, note 6 *supra*, at 93.

<sup>27</sup> Manasyan, *supra* note 19, at 19.

<sup>28</sup> Asenbauer, §5.2.3 *The Anchoring of the Right of Self-Determination in the Soviet Union*, note 6 *supra*, at 125. As Article 78 provides: "The territory of a Union Republic may not be altered without its consent. The boundaries between Union Republics may be altered by mutual agreement of the Republics concerned, subject to ratification by the Union of Soviet Socialist Republics."

<sup>29</sup> Manasyan, *supra* note 19, at 11. As Article 3 of that statute provides: "In a union republic [Soviet Union], being composed of autonomous republics [SSRs], autonomous regions and autonomous districts [certain oblasts], a referendum is carried out separately in each autonomous body. The people of autonomous republics and autonomous formations have the right to independently decide the question of remaining in the USSR or of leaving, and also to raise the question of their state-legal status." An English version of the entire 1990 statute is provided in T.M. Shamba & A.U. Neproshin, *Abkhazia's Statehood in the Post-Soviet Period* (July 2004), at: <[http://www.circassianworld.com/Shamba\\_Neproshin.html](http://www.circassianworld.com/Shamba_Neproshin.html)>.

<sup>30</sup> Rapporteur: Mr. David Atkinson, United Kingdom, European Democrat Group, *The conflict over the Nagorno-Karabakh region dealt with by the OSCE Minsk Conference* (2004) Doc. 10364, App. 1, p. 36, at: <<http://assembly.coe.int/Documents/WorkingDocs/doc04/edoc10364app.pdf>>.

<sup>31</sup> Manasyan, *supra* note 19, at 25. This conference facilitates an ongoing, bilateral, and unofficial dialogue between American and Soviet (now, Russian) representatives (starting in 1960).

provides: “Each member state shall undertake the necessary measures to ensure the stable situation in the external frontiers of the Commonwealth member states.” Under Article 17: “The Commonwealth member states shall refrain from actions, which are likely to cause losses to other member states and result in the aggravation of eventual disputes.”<sup>32</sup>

As a regional model, the comparable European Community Guidelines on the Recognition similarly provide: “The Community and its member States ... [requires—] ... respect for the inviolability of all frontiers which can only be changed by peaceful means and by common agreement....”<sup>33</sup> Armenia is thus in no position to publicly champion the cause of Nagorno Karabakh in the latter’s quest for international recognition of its unilateral declaration of independence.

Armenia’s non-recognition of NK is literally impacted by geopolitical limitations as well. One is that Armenia is landlocked, with most of its borders closed off—by Turkey to the northwest, and Azerbaijan to the southwest—while Armenia’s entire eastern border with Azerbaijan is also closed. Armenia’s northern external corridor is limited to Georgia. Its southern exit is limited to the diminutive portion of Iran sandwiched between Azeri territories (see above map).

Armenia’s geographical restraints do not tell the entire NK non-recognition story. There is an incredibly telling split of opinion, between Armenians in Armenia and NK, regarding NK’s presumed final status. In Armenia’s capital city of Yerevan, I did a presentation (Aug. 6, 2012) entitled “Remedial Secession in the South Caucasus.” I therein referred to Luis Almagro, Uruguay’s Foreign Minister. He articulated the proposition that “Nagorno Karabakh is part of historic Armenia and it must be independent and in a short while be unified with Armenia. This is the only resolution to the Artsakh [Armenian for NK] issue.”<sup>34</sup> I thus raised the question whether NK’s Armenians—having fought and died for independence from Azerbaijan—would in fact choose to realign themselves with Armenia. The American University Armenia (AUA) audience vigorously disavowed any possibility that NK would not seek to rejoin with Armenia.

This position was not limited to AUA academics. My dozen in-the-streets conversations with Yerevan residents confirmed the same, unfaltering reunification perspective. They uniformly assumed that Armenia, by allowing its military volunteers to fight in the NK conflict, sees only one final status conclusion for NK: that NK will one day be reunited with Armenia.

Shortly thereafter (Aug. 9, 2012) in NK’s capital city of Stepanakert, the Prime Minister and Chairman of the National Assembly (Speaker of the House) provided a far more nuanced response to the same reunification issue I had just raised in Yerevan. NK’s official position is to “maintain the status quo.”<sup>35</sup> Linkage with Armenia is a possibility; however, NK’s government sees no pressing need to choose between reunification and permanent statehood.

---

<sup>32</sup> Charter of the CIS (1993), 34 I.L.M. 1279 (1995).

<sup>33</sup> *Declaration on the ‘Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union’* (Dec. 1991), at: <<http://207.57.19.226/journal/Vol4/No1/art6.html>>.

<sup>34</sup> *Uruguay May Recognize Nagorno Karabagh Republic* (Sept. 9, 2011), *The Armenian Weekly*, at: <<http://www.armenianweekly.com/2011/09/09/uruguay-may-recognize-nagorno-karabakh-republic>>.

<sup>35</sup> Araik Harutyunyan (PM) and Ashot Ghoulian (Chairman).

*Alternative Basis for Secession's Legitimacy*

In the interim, given its at best de facto statehood posture, NK is yet another modern unilateral secession in need of a viable legal analysis, as opposed to the military and political ripostes that characterizes NK-Azeri relations. An NGO roundtable in Stepanakert's Foreign Ministry this August poignantly thrust the questioned need for *legal* arguments into the spotlight. This particular inquiry was surprising—from a lawyer's perspective. It instantly tempted me to respond that the international community likely (but not necessarily reasonably) lumps NK's unilateral declaration of independence into the genre of recognition refusals including Bosnia's Republika Srpska, the Turkish Republic of Northern Cyprus, South Ossetia, and Abkhazia. But as my colleague Professor Christopher Guzelian shrewdly responded: "A persuasive legal argument can help NK achieve a positive political settlement." I will thus conclude this essay by proposing an alternative legal argument. I will suggest that NK abandon any reliance on its interpretation of the above-considered 1990 Soviet statute (used to buttress the validity of NK's separation from Azerbaijan).

There is no multilateral treaty on secession. There never will be. That would be political suicide. An alternative source of International Law—State practice—does not provide an expedient yardstick for measuring the legitimacy of unilateral secessions. On the one hand, a bedrock principle in numerous international instruments proclaims the inviolability of international borders. Thus, the right to self-determination does not include a general right of secession. Russia and the United States, for example, claimed that the three major post-Soviet era secessions (South Ossetia and Abkhazia in 1991, and Kosovo in 2008) were unique. They allegedly could not be precedents for other separatist conflicts.<sup>36</sup>

On the other hand, equity augments the law when its consequences are unacceptably harsh—and thus the therapeutic option of remedial secession.<sup>37</sup> The quest for sources of International Law—to ascertain its content in the absence of a treaty, and in the presence of such unexplained State practice assertions—necessarily leads one to national and international judicial decisions.<sup>38</sup> The International Court of Justice 2010 Kosovo *Unilateral Declaration of Independence in Respect of Kosovo* case presented an opportunity to bring clarity to the law governing the legitimacy of unilateral secessions. But pursuant to the Court's crucial caveat, that issue was not part of the proceedings:

[T]he question ... asks for the Court's opinion on whether or not the [Kosovo Assembly's] declaration of independence is in accordance with international law. It does not ask about the legal consequences of that declaration. In particular, it does not ask whether or not Kosovo has achieved [legitimate] statehood. Nor does it ask about the validity or legal effects of the recognition of Kosovo by those States which have recognized it as an independent State. ... Accordingly, the Court does *not* consider that it is necessary to address ... whether or not the declaration has led to the creation of a State or the status of the acts of recognition....<sup>39</sup>

---

<sup>36</sup> Regarding US and Russian denials that South Ossetia, Abkhazia, and Kosovo are precedents for other unilateral secessions, see Rein Müllerson, *Precedents in the Mountains: On the Parallels and Uniqueness of the Cases of Kosovo, South Ossetia and Abkhazia*, 8 Chinese J. Int'l L. 2 (2009), available online, at: <<http://chinesejil.oxfordjournals.org/content/8/1/2.full>>.

<sup>37</sup> Perhaps the most comprehensive work product on secession is the 45-part, individually authored Aleksandar Pavkovic & Peter Radan (ed.), *Ashgate Research Companion to Secession* (Surrey, UK: Ashgate, 2011).

<sup>38</sup> Statute of the Int'l Court of Justice, Art. 38.1.d.

The lone authoritative court decision on point is the 1998 Canadian Supreme Court's *Secession of Quebec from Canada* case.<sup>40</sup> As its three-pronged approach provides, there must be: (1) a "People;" (2) gross human rights violations; and (3) no alternative but secession. NK cannot have it both ways, however. NK's interpretation of the above April 3, 1990 statute—purportedly authorizing oblast secessions as the Soviet Union was falling<sup>41</sup>—if accurate, would: (a) yield a (highly questionable) legal basis for its unilateral declaration of independence; while (b) simultaneously depriving NK of the comparatively viable *Secession of Quebec* basis for more soundly supporting its legal claim to legitimate statehood.

Under this case law doctrine, a viable source of International Law,<sup>42</sup> NK's unilateral declaration of independence is ostensibly legitimate.<sup>43</sup> As proposed by independent US think tanks: "Nagorno Karabagh has a right of self-determination, including the attendant right to independence, according to the criteria recognized under international law...."<sup>44</sup> NK's Armenian population, a "People" within Azerbaijan, declined from 330,000 to 153,000 as a result of gross human rights violations over many decades. The remaining *Secession of Quebec* element is whether there was no alternative but secession.

Being overrun, conquered, massacred, and controlled for several millennia—exemplified by the recent decades of continuous conflict within the nation *surrounding* NK—provides NK with a comparatively durable legal argument for claiming the legal legitimacy of its secession from Azerbaijan. NK should adopt the *Quebec Secession* approach, rather than clinging to its questionable interpretation of the above 1990 Soviet statute. NK could, alternatively, at least declare its official reliance on the *Quebec Secession* approach as one of two arguments, although they are seemingly mutually exclusive. That is, if the statute provides NK with a legal basis for secession, then NK cannot reasonably claim there is no available legal basis for secession.

NK should renovate its Soviet-statute-overrules-Constitution legal posture. It should adopt, instead, the *Quebec Secession* elements as the legal basis for its legitimacy claim. NK would thereby advance a more viable international basis for legitimacy—thus favorably comparing with the specious validity of other contemporary unilateral secessions.<sup>45</sup>

<sup>39</sup> I.C.J. Advisory Opinion, *Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo* 51, General List No. 141 (2010), at: <<http://www.icj-cij.org/docket/files/141/15987.pdf>> (italics added).

<sup>40</sup> *Reference by the Governor-General concerning Certain Questions relating to the Secession of Quebec from Canada* (1998) 2 S.C.R. 217; 161 D.L.R.4th 385; 115 Int'l Law Rep. 536.

<sup>41</sup> See text accompanying note 37 *supra*.

<sup>42</sup> See text accompanying notes 36–40.

<sup>43</sup> Details on the author's perspectives are available in the You-Tube version of his August 2012 presentation "Remedial Secession in the South Caucasus." That presentation was delivered at Free Tbilisi University (Aug. 2, 2012), Tbilisi, Georgia. See:

<<http://www.youtube.com/watch?v=NH2N4NGtbGQ&feature=share&list=UUGslH8OoAgATLQmfCET-Icw>>.

Note therein that the "three 2008 unilateral secessions" (South Ossetia, Abkhazia, and Kosovo) refers to the circumstance that the 1991 secessions of the two formerly Georgian provinces were not considered a *fait accompli* by the West until the 2008 Russia-Georgian War—and that they have yet to be recognized as legitimate by the vast majority of the international community. The legitimacy of Kosovo's unilateral declaration is also therein addressed.

<sup>44</sup> Blueprint, *supra* note 4, at 21.

<sup>45</sup> For example, the 1% ethnic Russian composition of South Ossetia and Abkhazia residents—before, during, and after the 2008 Georgia-Russia war—were not impacted by events leading up to that conflict. Meeting with Archil Giorgadze, a Georgian diplomat involved with conflict negotiations (and gracious host, during my stay in Tbilisi in August 2012). The separatists in those areas claim that Georgia initiated genocidal-ethnic cleansing policies, and thus the need for Russian intervention. But assuming the above-argued minimal impact on ethnic Russians, neither oblast could support its unilateral secession from Georgia via the gross human rights violations element of the *Secession of Quebec from Canada* test. Regarding Kosovo, see presentation cited in note 38 *supra*.